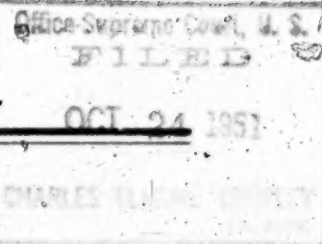


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SUPREME COURT U.S.



IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 349

**FIRST NATIONAL BANK OF CHICAGO, AS EXECUTOR
OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED,**

Petitioner,

vs.

UNITED AIR LINES, INC., A CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR CERTIORARI.**

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals, affirming the action of the District Court, is reported at 190 F. 2d 493. Prior to the rendition of that opinion, petitioner sought a writ of certiorari from this Court to review the judgment of the District Court. In that petition, petitioner raised the same three points now advanced as Points I, II and III in this petition. This Court denied the petition (341 U. S. 903; No. 558, October Term, 1950; R. 43). The present Point IV—the claimed violation of the Illinois Constitution—although ruled upon by the District Court was omitted from that petition.

JURISDICTION.

The statutory basis of jurisdiction of this Court is sufficiently stated in the petition.

QUESTIONS PRESENTED.

Was not the judgment of the Court of Appeals, affirming the action of the District Court, correct because:

1. May not Illinois, without violating the full faith and credit clause of the Federal Constitution, establish a public policy prohibiting suits in Illinois on foreign death statutes in those cases where the defendant can be served in the foreign state?

2. In a diversity suit, does not the doctrine of *Erie R. Co. v. Tompkins*, without violating Article III of the Federal Constitution, require the Federal courts in Illinois to recognize the public policy of Illinois, as expressed in its statute?

3. Was not a transfer to Utah under Section 1406(a) of the Judicial Code correctly denied for two reasons: first, the action was not brought in the wrong venue; and, second, the court did not have jurisdiction of the subject matter in any event?

4. Is not the proviso to Section 2 of the Illinois Injuries Act clearly valid under Section 13 of Article IV of the Illinois Constitution of 1870?

STATUTE INVOLVED.

The Illinois Injuries Act as it existed at the time of the filing of this suit in 1948 is set forth in the Appendix at the end of this Brief. Since then, Section 2 has been amended in matters not here material (Illinois Revised Statutes, 1949, Chapter 70, Section 2; Laws of Illinois 1949, p. 1029). The part of Section 2 here important (unchanged since its enactment in 1935) provides as follows:

“Provided, further, that no action shall be brought

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or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

This Illinois statute differs significantly from the Wisconsin statute declared invalid by this Court in *Hughes v. Fetter*, 341 U. S. 609, in that the Illinois statute does not, as did the Wisconsin statute, prohibit all actions for foreign deaths. The Illinois statute recognizes the foreign death right of action, but bars such an action in Illinois only when it can be prosecuted in the state where the death occurred.

STATEMENT.

Petitioner's decedent was killed in an airplane crash in Utah in 1947 while a passenger aboard respondent's DC-6 airliner. Petitioner, as executor, brought suit in the District Court in Illinois under the Utah Death Statute (Sec. 104-3-11 Utah Code Ann. 1943) against respondent (R. 3, 4; Petition, p. 2).

As a bar, respondent set up the above quoted portion of Section 2 of the Illinois Injuries Act and the fact that respondent was qualified to do business in Utah and had registered agents there available for service of process (R. 10). Petitioner moved to strike on the ground that this statute could not limit the jurisdiction of the federal courts (R. 11).

Thereafter, petitioner twice amended its motion to strike to raise the constitutional questions here attempted to be presented (the claimed violations of the full faith and credit clause, of Article III and of the single-subject provision of the Illinois Constitution) (R. 13, R. 19). Each

motion to strike was accompanied by an alternative motion to transfer the cause to Utah (R. 12, 15, 21).

The District Court denied both the motion to strike and the motion to transfer and, petitioner declining to plead further, entered judgment for the respondent (R. 22-24).

Petitioner appealed to the Court of Appeals (R. 25), but prior to judgment in that Court petitioned this Court for certiorari. As stated, this Court denied the petition. The Court of Appeals affirmed, correctly interpreting, respondent submits, the decision of this Court in *Hughes v. Fetter*, 341 U. S. 609, which had been decided during the pendency of the appeal in the Court of Appeals.

ARGUMENT.

SUMMARY.

The judgment of the Court of Appeals was correct. The Illinois statute, unequivocally stating the fixed public policy of the State of Illinois, does not violate the full faith and credit clause—it does not absolutely prohibit all foreign death actions in Illinois, but only those in which suit can be brought in the state of the death. Thus, a plaintiff is always assured of a right of action and a forum for redress. This significant difference makes inapplicable the decision and reasoning of this Court in *Hughes v. Fetter*, 341 U. S. 609, invalidating the Wisconsin statute. Further, under the doctrine of *Erie R. Co. v. Tompkins* and the subsequent decisions of this Court, the Illinois statute prevents petitioner from suing in the Federal courts in Illinois where the only ground of federal jurisdiction is diversity of citizenship; Article III of the Federal Constitution is not thereby violated. Nor does the Illinois statute violate the single-subject provision of the Illinois Constitution.

Finally, the transfer to Utah was correctly refused.

I.

THE PROVISIO TO SECTION 2 DOES NOT VIOLATE THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION.

Petitioner argues that the proviso violates the full faith and credit clause.* Its argument now is grounded upon *Hughes v. Fetter*, 341 U. S. 609, which invalidated the Wis-

* The same contention was advanced in this Court by petitioner in its original petition for certiorari.

consin Injuries Act.** Respondent believes the Court of Appeals (190 F. 2d 493, 494-496; R. 46-49) correctly held that decision inapplicable. In that case, the Wisconsin statute absolutely prohibited suits in Wisconsin on foreign death actions. The Illinois statute contains no such provision. It recognizes foreign death actions and authorizes such suits to be brought in Illinois, except where there is a right of action in the foreign state and the defendant can be there served. If, however, a defendant cannot be served in the foreign state, but can be served in Illinois, then Illinois refuses to become an asylum for such a defendant and suit can be brought in its state courts. Under the Illinois statute a plaintiff always has a right of action and a forum in which to prosecute it. Such a statute clearly does not violate the full faith and credit clause and is readily distinguished from the statute involved in *Hughes v. Fetter*. The opinion of the Court of Appeals correctly so states (190 F. 2d 493, at 494-496; R. 46-49).

The right of Illinois to exclude from its courts certain foreign death actions is based on sound authority:

It is well settled that rights given by a foreign statute will not be enforced in another state where they offend the statutes or public policy of the forum (*Texas & Pacific R. R. Co. v. Cox*, 145 U. S. 593, 605; *Stewart v. Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 448; *Indemnity Insurance Co. of North America v. Pan American Airways*, 57 F. Supp. 980, 981 (D. C., N. Y.); *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198, 200, and cases therein cited; *State, ex rel., Bossung v. District Court*, 140 Minn. 494, 168 N. W. 589, 590; Restatement of the Law, Conflict of Laws, Section 612).

** The original petition was denied on April 9, 1951 (341 U. S. 903), after the *Hughes* case had been argued before this Court (341 U. S. 609).

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In *Griffin v. McCoach*, 313 U. S. 498, this Court said at page 507:

“ . . . Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment it has recognized that a state is not required to enforce a law obnoxious to its public policy. *Bradford Electric Co. v. Clapper*, 286 U. S. 145, 160, 161; *Hartford Indemnity Co. v. Delta Co.*, 292 U. S. 143, 150.”

Further, the sovereign, in its discretion, may refuse to aid the foreign right (Mr. Justice Cardozo, in *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198, at 202).

The public policy of the State of Illinois is clearly and unambiguously expressed:

“Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.”

That policy is not a prohibition against *all* foreign death actions, but only against those where there is a right of action in the foreign state and the defendant can be there served. In other words, Illinois has refused not only to become an asylum for those seeking to avoid their just obligations, but it has equally refused to become a magnet drawing to itself wrongful death actions from all over the Union. The fact is that the party injured by the wrongful death always has an action and a forum.

When the proviso was initially added in 1903 (Laws of Illinois 1903, p. 217), it prohibited all foreign death actions as did the Wisconsin statute. In 1935, however, it was changed to its present form set out above (Laws of Illinois 1935, p. 916).

Further, in interpreting the full faith and credit clause, this Court has repeatedly insisted that it will weigh all the interests of each state involved before holding that the full faith and credit clause qualified one state's power to govern its own affairs. In *Alaska Packers Assn. v. Industrial Accident Comm.*, 294 U. S. 532, this Court refused to give effect to an Alaska statute in a proceeding in California. The Court said at page 547:

"... the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."

Petitioner, by its quotation from *Pink v. A. A. A. Highway Express*, 314 U. S. 201 (Petition, p. 15), concedes that the Constitution cannot be used as a means for compelling one state wholly to subordinate its own laws and public policy concerning its peculiarly domestic affairs to the laws and policies of others.

The public policy of Illinois in this case, as expressed in its statute, clearly outweighs the interest of Utah and the other states of the Union for the following reasons:

The legislature of Illinois undoubtedly had in mind the difficulties and hardships involved in compelling witnesses, who in all probability would reside in the state where the accident occurred, to come to Illinois to testify. Other important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Too, Illinois is vitally interested in preventing the administrative difficulties which arise in its courts when litigation is piled up in congested centers, instead of being handled at the place of origin, and in providing relief from the unjust tax burdens and the burdens of jury duty imposed upon its residents when foreign cases are imported into its courts. Further, Illinois is naturally interested in preserving to its citizens reasonable access to its already overcrowded courts.

Although the Court of Appeals mentioned only one factor—the case load—as justifying the Illinois policy, the other considerations mentioned above are equally important.

Considerations such as these were recognized as important and controlling by this Court in upholding the right of states to deny to non-residents access to their “often over-crowded courts” in actions under the Federal Employers’ Liability Act (*Missouri, ex rel., Southern Railway v. Mayfield*, 340 U. S. 1, 4; *Douglas v. New York, New Haven & Hartford R. R. Co.*, 279 U. S. 377).

Furthermore, a state court “may in appropriate cases apply the doctrine of *forum non conveniens*.” (*Gulf Oil Corporation v. Gilbert*, 330 U. S. 501, at 504.) Similarly, this Court has sustained Federal statutes granting a defendant the same protections as afforded by that doctrine. (*U. S. v. National City Lines*, 334 U. S. 573, at 598.)* With the same justification, a state legislature may by statute, as did Illinois, afford a defendant the same protection. Such state action is reasonable and is a valid motive or justification (Petition, p. 16).

* To the same effect, see *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501; *Koster v. Lumbermen’s Mutual Co.*, 330 U. S. 518; and *Mottoleno v. Kaufman*, 176 F. 2d 301, 303. In some of the cases “often overcrowded courts” are referred to. Also “administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin.”

A statute enacted in the interests of the orderly and speedy administration of justice should not be held to violate the full faith and credit clause so long as it does not deprive a plaintiff of all right of redress. The Illinois statute does not.

The Court of Appeals correctly held that the proviso to Section 2 did not violate the full faith and credit clause.

II.

THE PROVISIO TO SECTION 2 DOES NOT VIOLATE ARTICLE III OF THE FEDERAL CONSTITUTION.

Plaintiff argues that the application, under the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, to the federal courts in diversity cases of the proviso in Section 2 violates Article III of the Federal Constitution.*

Diversity Jurisdiction.

The Court of Appeals, although not referring specifically to Article III, rejected this contention in *Trust Company of Chicago v. Pennsylvania Railroad Co.*, 183 F. 2d 640 (cited by the Court in its opinion in this case (190 F. 2d 493, 494; R. 46)). In the *Trust Company* case, the Court said at page 644:

"Nor do we think this means that the state statute has impaired the federal jurisdiction. Federal diversity jurisdiction, created by the Congressional act, as interpreted by the Supreme Court, is limited in the absence of other grounds for jurisdiction, to cases which the state court might entertain. In other words, implicit in the diversity statute, is the limitation resulting from the Supreme Court's interpretation of diversity jurisdiction. If, as the court says, the federal

* The same argument was made to this Court in petitioner's first petition for certiorari.

court, sitting in diversity cases, is only another court enforcing the remedies cognizable by the state court, the limitation upon diversity jurisdiction is inherent in the act creating Federal jurisdiction solely upon the accident of diversity. No new remedies are created by the statute; it merely lodges in another court the authority to enforce remedies cognizable in the state court. The federal court, by congressional intent, as the Supreme Court rules, is just the same as that of the state court (provided diversity exists), no more and no less. If, as has been suggested, diversity jurisdiction has been limited; that limitation arises not from action of the state but exists inherently in the federal statute itself as authoritatively interpreted."

Further, the argument that Article III is violated is based upon a misconception of the source of the diversity jurisdiction of the federal courts. That jurisdiction is not one granted by the Constitution, but is one derived wholly from the authority of Congress. (*Kline v. Burke Construction Co.*, 260 U. S. 226, 233-234.)

Naturally a federal court has power to determine the question of its own jurisdiction. And that was done here by the District Court when it found that Section 2 of the Illinois Injuries Act was applicable under the doctrine of *Erie R. Co. v. Tompkins* and closed the federal courts in Illinois to petitioner's claim.

Under petitioner's argument, the doctrine of *Erie R. Co. v. Tompkins* (which applies *only* in diversity cases) could never result in the law of the forum closing the federal courts, because every question, according to plaintiff, would be a federal question under Article III. This Court, however, has held the federal courts closed by state statutes. (*Angel v. Bullington*, 330 U. S. 183; *Woods v. Interstate Realty Co.*, 337 U. S. 535.)

Erie R. Co. v. Tompkins.

The doctrine of *Erie R. Co. v. Tompkins*, and the subsequent decisions of this Court following that case, were correctly applied.

Petitioner concedes (Petition, pp. 27-28) that, under the doctrine of *Erie R. Co. v. Tompkins*, that which is applied is state policy no matter how that policy is expressed. It further concedes (Petition, p. 27) that such policy can be expressed by a statute barring jurisdiction of its courts. Here, Illinois has positively, by statute, expressed a state policy, i. e., the refusal to entertain in its courts suits for deaths occurring outside of Illinois so long as there is a right of action in the foreign state and the defendant can be served there.

The Court of Appeals in *Trust Company of Chicago v. Pennsylvania Railroad Co.*, 183 F. 2d 640, and *Munch v. United Air Lines*, 184 F. 2d 630, held that under the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, the proviso of Section 2 of the Illinois Act prevented the plaintiffs from suing in the federal courts in Illinois where the only ground of federal jurisdiction was diversity of citizenship.* Respondent believes that the Court of Appeals in this case and in the *Trust Company of Chicago* and *Munch* cases correctly held that the proviso to Section 2 prevents suit

* The *Trust Company of Chicago* (183 F. 2d 640) and *Munch* (184 F. 2d 630) cases overruled two earlier decisions by the Court of Appeals (*Stephenson v. Grand Trunk W. R. Co.*, 119 F. 2d 401, and *Davidson v. Gardner*, 172 F. 2d 188) (Petition, p. 8). This Court, however, had granted certiorari in the *Stephenson* case limiting its review solely to the question whether the District Court properly disposed of the case in view of Section 2 of the Illinois Injuries Act (310 U. S. 623). Subsequently, the parties settled the case and dismissed it on stipulation (311 U. S. 720). In a note in 44 Illinois Law Review 533, at 536, it is observed in connection with the *Stephenson* and *Davidson* cases (footnote 20) " . . . Had the cases reached the Supreme Court, there seems little doubt but that they would have been reversed."

in Illinois in diversity cases and that no other decision is consistent with *Guaranty Trust Co. v. York*, 326 U. S. 99; *Angel v. Bullington*, 330 U. S. 183; *Woods v. Interstate Realty Co.*, 337 U. S. 535; *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541; *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530, rehearing denied 338 U. S. 839.

In connection with these cases plaintiff admits (Petition, p. 29) that *Woods v. Interstate Realty Co.* and *Angel v. Bullington* "both had to do with local statutes barring jurisdiction of local courts." This is exactly the situation here and in both of those cases the bar of the state statutes was upheld as applicable to the federal courts. These decisions clearly show that they do not rest on any question of terminology: supposed differences between substance or procedure or between substantive rights or remedial rights or between a defense or a substantive bar are not the controlling factor. The paramount consideration in diversity cases is that federal litigants should have only such rights as they would have in the state courts in the same state. If the state courts are closed so also are the federal courts. In *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530, the Court succinctly expressed the essence of the doctrine of *Erie R. Co. v. Tompkins* at page 532:

"*Erie R. Co. v. Tompkins*, 304 U. S. 64, was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court, it should be denied in the federal court. Otherwise, those authorized to invoke the diversity jurisdiction would gain advantages over those confined to state courts."

Reduced to its essence, petitioner's argument is that *Erie R. Co. v. Tompkins*, 304 U. S. 64, and the cases sub-

sequently decided by this Court are unconstitutional under Article III and should be overruled.

Article III has not been violated. The decision of the District Court, affirmed by the Court of Appeals, is correct.

III.

PETITIONER'S MOTION UNDER SECTION 1406(a) OF THE JUDICIAL CODE TO TRANSFER THE CAUSE TO UTAH WAS CORRECTLY DENIED.

The Court of Appeals correctly affirmed the refusal of the District Court to grant petitioner's alternative motion to transfer this case to the District Court of Utah under Section 1406(a) of the Judicial Code (Title 28 U. S. C., Sec. 1406(a)), (R. 23).*

That section provides:

"(a) The district court of a district in which is filed a case *laying venue in the wrong division or district* shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." (Emphasis supplied.)

That section applies only when there is **wrong venue**. (See Reviser's Note quoted below in *Orr v. United States*, 174 F. 2d 577.) If the District Court here had had jurisdiction, the venue was correct under Section 1391(c) of the Judicial Code because defendant was doing business in Illinois (Title 28, United States Code, Section 1391(c)). Venue being proper, Section 1406(a) therefore has no application.

The fact that the District Court was without jurisdiction because of the proviso to Section 2 (see below) does not mean that the venue was improper, for the reason that

* Petitioner's original petition to this Court also attacked the refusal to transfer under Section 1406(a).

there is a vast and essential difference between jurisdiction and venue (*Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167-168; Moore's Commentary on the U. S. Judicial Code, pages 172-173). Lack of jurisdiction of subject matter is fatal and can be raised at any time (*Green v. Obergfell*, 121 F. 2d 46, 54-55 (C. A., D. C.), certiorari denied 314 U. S. 637; *Walton v. Pryor*, 276 Ill. 563, 565).

Trust Company of Chicago v. Pennsylvania Railroad Company, 183 F. 2d 640, at 646; held in a similar fact situation that Section 1406(a) was inapplicable.

The cases relied on by petitioner (*Orr v. United States*, 174 F. 2d 577 (C. A. 2) and *Untersinger v. United States*, 181 F. 2d 953 (C. A. 2)) are not in point, as in both cases the venue was improper.*

As stated, lack of jurisdiction is not improper venue.

In addition, there can be no transfer under Section 1406(a) unless the court initially has jurisdiction.

In *Orr v. United States*, 174 F. 2d 577 (C. A. 2), relied on by petitioner, the Court said at page 580:

"The Reviser's Note to Section 1406(a) says that that section 'provides statutory sanction for transfer instead of dismissal, where venue is improperly laid.' This comment on the scope of Section 1406(a) seems to point directly to the elimination of the bar of the statute of limitations in cases *where jurisdiction exists* and there is nothing to prevent its exercise but the lack of proper venue." (Emphasis supplied.)

The proviso to Section 2 of the Illinois Injuries Act deprives the court of jurisdiction of the subject matter. The Court of Appeals so held in this and in the *Munch* and *Trust Company of Chicago* cases. The Illinois law on this is

* That improper venue was the controlling issue in the *Orr* case is apparent from *LeMee v. Streckfus Steamers, Inc.*, 96 F. Supp. 270, 272 (D. C., Mo.).

also clear. (*Dougherty v. American McKenna Process Co.*, 255 Ill. 369; *Wall v. Chesapeake & Ohio Railroad Co.*, 290 Ill. 227; *Walton v. Pryor*, 276 Ill. 563.) Therefore, no transfer can be made under Section 1406(a).

Herb v. Pitcairn, 325 U. S. 77, is no authority for a transfer in this case. In that case the Court merely held that the statute of limitations of the Federal Employers' Liability Act had been satisfied; it decided nothing as to a transfer even under the Illinois practice. More important, no question was raised, and consequently none was decided, as to federal transfer procedure. As shown above, no transfer can be made under Section 1406(a) unless the court initially has jurisdiction.

Petitioner relies upon the fact that the *Stephenson* (110 F. 2d 401) and *Davidson* (172 F. 2d 188) cases were not overruled until the statute of limitations had run (Petition, p. 2), but the chronology of events shows its reliance was not well founded.

In this case, petitioner's death occurred October 24, 1947 (R. 3). Suit was filed October 5, 1948 (R. 3). The applicable Utah statute of limitations was two years (R. 16); thus bringing the time within which to file suit to October 24, 1949. Respondent raised the jurisdictional bar of Section 2 on November 15, 1948, slightly more than a month after suit was commenced (R. 8). The statute of limitations still had more than eleven months to run. But not until seventeen months later (April 26, 1950) did petitioner move to strike (but not on constitutional grounds) and to transfer the cause to Utah under Section 1406(a) (R. 11, 12).

Guaranty Trust Co. v. York had been decided by this Court on June 18, 1945; *Angel v. Bullington* on February 17, 1947. The *Woods*, *Ragan* and *Cohen* cases were decided on June 20, 1949. Thus almost four months remained after these decisions in which to start suit in Utah, but petitioner

chose not so to do. It was not until November 8, 1950, after the decisions by the Court of Appeals in the *Trust Company of Chicago* case (July 3, 1950) and the *Munch* case (October 9, 1950) that petitioner amended its motion to strike to raise the constitutional questions now presented (R. 13).

The Court of Appeals correctly affirmed the District Court's denial of the alternative motion to transfer.

IV.

THE PROVISIO TO SECTION 2 DOES NOT VIOLATE SECTION 13 OF ARTICLE IV OF THE ILLINOIS CONSTITUTION OF 1870.

In its essence, petitioner's argument is that, under Section 13 of Article IV (the single-subject provision of the Illinois Constitution of 1870—"No act hereafter passed shall embrace more than one subject and that shall be expressed in the title.") the proviso to Section 2 is invalid because it could not originally have been enacted as a part of the Injuries Act for the reason it does not come within the title of the Act—"An Act requiring compensation for causing death by wrongful act, neglect or default."

The argument made is without foundation. But even if it had merit, this Court will be very reluctant to declare the proviso to be in violation of the state constitution, for the reason that it is an elementary principle of federal jurisprudence that the federal courts are reluctant to adjudicate a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals. And this reluctance becomes more imperative when the statute has been before the highest court of the state and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented or determined

(*Michigan Central Railroad v. Powers*, 201 U. S. 245, 291, 292).

Since 1908, several cases concerned with the proviso to Section 2 of the Injuries Act have been decided by the Supreme Court of Illinois (*Crane v. C. & W. I. R. R. Co.*, 233 Ill. 259; *Dougherty v. American McKenna Co.*, 255 Ill. 369; *Walton v. Pryor*, 276 Ill. 563, and *Wall v. Chesapeake & Ohio Ry. Co.*, 290 Ill. 227).

As stated, the argument now made is without merit. *Michaels v. Hill*, 328 Ill. 11, 15-16, quoted by the Court of Appeals (190 F. 2d 493, 496; R. 49), clearly sustains the validity of the proviso to Section 2.

The Court of Appeals, as did the District Court, correctly held that the Illinois Constitution was not violated.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Appendix.

Illinois Revised Statutes (1947), Chapter 70:

WRONGFUL DEATH.

An Act requiring compensation for causing death by wrongful act, neglect or default. (Approved February 12, 1853. L. 1853, p. 97.)

1. Killing—Action survives) Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

2. Action—By whom Brought—Limit of Damages—Death outside State.) Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with refer-

ence to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of \$15,000: Provided, that every such action shall be commenced within one year after the death of such person. Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.